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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

KELLY WHALEN, individually and on
behalf of all others similarly situated, and
S.M., a minor, by and through her guardian,
Tachah Wade, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:20-CV-06361-JST

**STIPULATION REGARDING REMOTE
DEPOSITION PROTOCOL AND
PROPOSED ORDER**

Hon. Jon S. Tigar

1 Plaintiffs Kelly Whalen and S.M. (“Plaintiffs”) and Facebook, Inc. (“Facebook”)
 2 (collectively, the “Parties”), jointly stipulate to the following protocol for conducting depositions
 3 via remote means in the above-captioned matter due to the ongoing COVID-19 pandemic:¹

4 1. PUBLIC HEALTH EMERGENCY

5 a. During the public health emergency related to the COVID-19 pandemic, the
 6 Parties must comply with relevant public health orders, remain mindful of those performing
 7 essential services, and use their best efforts to minimize any risks to the health and safety of
 8 witnesses, attorneys, and other personnel involved with the taking of depositions.

9 b. The current public health emergency related to COVID-19 is likely to
 10 persist while certain depositions in this matter take place.

11 c. While taking adequate health and safety precautions, the Parties intend to
 12 advance the litigation as much as practicable, including by taking depositions.

13 d. Accordingly, as set forth below, while the public health emergency caused
 14 by COVID-19 remains in effect, any deposition in this matter shall be taken remotely pursuant to
 15 the Terms of this Order upon request of any party or the witness being deposed.

16 2. REMOTE DEPOSITION PROTOCOL

17 a. **Applicability:** Where the witness, the witness’s counsel, and/or the
 18 noticing counsel are appearing for the deposition remotely, the following Remote Deposition
 19 Protocol shall apply.

20 b. **Length of Deposition:** If proceeding by deposition remotely impacts the
 21 ability to proceed with the deposition efficiently in a way that the noticing party could not
 22 reasonably have anticipated and avoided, then the Parties will act in good faith to provide
 23 additional time to complete the deposition beyond the 7 hours provided for in the Federal Rules of
 24 Civil Procedure. All counsel are expected to familiarize themselves with the software and
 25 procedures for conducting depositions remotely, and a failure of deposing counsel or their team
 26 members to do so is not grounds for extending the duration of the deposition.

27 ¹ This Order is not intended to act as a waiver of any party’s rights under the Federal Rules
 28 of Civil Procedure or any other applicable rules or orders pertaining to discovery in this matter.

1 c. **Remote administration of the oath:** The Parties agree that a court reporter
2 will administer the oath to the deponent remotely by means of the video and audio connection.
3 Further, if a court reporter is not authorized to take oaths in the place of examination pursuant to
4 Federal Rule of Civil Procedure 28, the Parties agree that the extenuating circumstances of the
5 ongoing global COVID-19 pandemic warrant proceeding with the administration of such oaths
6 remotely and that the transcripts may be used by or against all Parties in this litigation to the same
7 extent that would otherwise be permissible under the Federal Rules of Civil Procedure and the
8 Federal Rules of Evidence. For avoidance of doubt, a deposition will be deemed to have been
9 conducted “before” an officer so long as that officer attends to the deposition via the same remote
10 means (*e.g.*, videoconference) used to connect all other remote participants, and so long as all
11 participants (including the officer) can clearly hear and be heard by all other participants. The
12 Parties agree not to challenge the validity of any oath administered by the court reporter, even if
13 the court reporter is not a notary public in the state where the deponent resides.

14 d. **Video-conferencing:** Where the witness, witness’s counsel, and/or the
15 noticing counsel are appearing for the deposition remotely, then a video conferencing service will
16 be utilized and video of the witness will be recorded by a videographer for later use in proceedings
17 in this case, including trial. The video-conferencing platform must allow for the deponent,
18 attending counsel, deposing counsel, defending counsel, court report, and videographer to
19 participate in the deposition without attending the deposition in person. The Parties agree that the
20 Party noticing the deposition shall retain Veritext to provide court reporting, videoconference,
21 videography, and remote deposition services in conformity with the terms of this Stipulation. The
22 Parties agree that an employee of Veritext may attend each remote deposition to troubleshoot any
23 technological issues that may arise.

24 e. **Videoconferencing Equipment:** A witness who appears remotely for his
25 or her deposition in accordance with the Terms of this Order must use videoconferencing
26 equipment sufficient to produce clear audio and video of the witness’s testimony and a private
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room for the duration of the deposition that will be free of distractions or interruption. The videoconferencing equipment used by the witness cannot be hand-held; it must be mounted or secured in such a way that provides for a stable audio and video feed throughout the course of the deposition. For the avoidance of doubt, the witness may not proceed with the remote deposition by using the camera function on his or her mobile device.

f. **Before the Deposition:**

i. **Noticing a Remote Deposition:** The Parties shall serve notice or revised notice of depositions that outline the remote means of taking the deposition, including the technologies used and how the Parties should connect to the deposition.

ii. **Deposition Preparation:** Counsel shall adequately prepare deponents and attorney attendees for depositions that are taken through remote means, including ensuring that the deponent is able to access and run the necessary software or web applications, and has a working camera and microphone on his or her computer, such that the witness can be seen and heard by all other participants.

iii. **Deposition Attendance:** Counsel will meet and confer ahead of any depositions that are taken through remote means to confirm who will be in attendance during the deposition. If the witness has requested to appear at the deposition remotely, then both the witness's counsel and deposing counsel shall appear at the deposition remotely as well. In other words, the witness or witness's counsel may not insist that deposing counsel appear at the deposition remotely while the witness's counsel is present with the witness during the deposition.

g. **During the Deposition:**

i. **Recording:** No one other than the videographer may record the deposition by video or audio means.

ii. **Connectivity:** If the deposition is proceeding by remote video, each party has the right to be present on video and to have clear audio. Once the deposition begins, if a lead counsel becomes disconnected from the deposition, either audio, video, or both, that fact

1 shall be noticed on the record as soon as the participants become aware and the deposition must
2 immediately be suspended until that attorney has re-joined and has full access to both audio and
3 video. The suspended time will not count against the applicable time limitations for depositions.
4 The court reporter will provide a telephone number for use by the attendees to inform the court
5 reporter if a lead counsel becomes disconnected or is otherwise experiencing technical difficulties.
6 Any portion of the deposition that has been transcribed while a lead counsel is absent or
7 experiencing technical difficulties must be re-read upon the resolution of the technical difficulty
8 and that attorney must be given an opportunity to object to any questions or answers that occurred
9 in his or her absence.

10 iii. **Use of Internet-Enabled Devices:** Prior to the start of the
11 deposition, the witness will power off any Internet-enabled devices capable of two-way
12 communication (i.e., cell phones, iPads, laptops, and tablets) that are present in the room with the
13 witness, and will place the devices out of reach and out of view of the witness. The specific device
14 that the witness is using to be seen and heard on the record by deposing counsel and the witness's
15 counsel during the deposition is exempt from this provision.

16 iv. **Counting Time:** During the deposition, to avoid the difficulties
17 posed by simultaneous speaking over an internet video and audio connection, counsel and the
18 witness will not interrupt each other and will strive to allow a moment between the conclusion of
19 one person speaking and another person speaking. If at any time the court reporter indicates that
20 he or she is unable to effectively transcribe the deposition due to technical difficulties, the
21 deposition shall be paused and the parties will attempt to resolve those issues. The suspended time
22 and any other reasonable delays or breaks necessary for the Parties to accommodate technological
23 issues arising from depositions that are taken through remote means shall be excluded from the
24 calculation of deposition time under Federal Rule of Civil Procedure 30(d)(1). If any technological
25 issue cannot be resolved to the satisfaction of the court reporter or the parties, the deposition shall
26 be suspended. This rule also applies to any technical difficulty that prevents the deponent or lead
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1 counsel from hearing or seeing the deposition. If the technical issues cannot be resolved, then the
2 deposition shall be suspended until the concerns are resolved by the Court or through other means.

3 v. **Conferences with the Attorney:** The deponent may speak
4 privately to their counsel when a pending question raises concerns for privilege or work product.
5 To do so, either the deponent will ask on the record for a break to speak with counsel off the record,
6 or deponent's counsel will ask on the record for a break to speak with the deponent off the record,
7 and the record will reflect the start and end of the break. There will be no communication by any
8 counsel with the deponent while the deposition is on the record by text, chat or any other means,
9 except those communications on the record.

10 vi. **Breakout Rooms.** During breaks in the deposition, the Parties may
11 use the breakout room feature provided by Veritext, if available, which simulates a live breakout
12 room through videoconference. Conversations in the breakout rooms shall not be recorded.

13 vii. **Video Feed:** During any depositions that are taken through remote
14 means, the lead counsel examining the deponent and lead counsel defending the deponent shall
15 each remain visible in frame while the deposition is on the record. The only window that the
16 deponent may have open or visible on his or her computer screen(s) is the videoconference
17 webpage or software necessary to attend the deposition and view any deposition exhibits. To the
18 extent the remote deposition software reasonably allows, the video feed of the deposition visible
19 to the deponent shall be limited to the image of the attorney who is speaking, any exhibits being
20 displayed to the witness, or the witness. The witness shall not have any other electronic
21 applications, webpages, communications or documents visible on his or her computer screen(s),
22 and should not consult any other electronic devices, such as additional computers, tablets, or
23 mobile phones. Any "chat" features shall be disabled and there will be no display of any chat
24 windows, instant messages or similar text. The limitations set forth in this Paragraph apply only
25 to time on the record during the deposition and do not apply during breaks when all participants
26 have agreed to go off the record.

1 viii. **Identifying Documents:** Lead counsel may use the video feed to
2 display documents to the witness during the deposition. However, during the deposition, when
3 displaying a document, counsel must first identify that document for the record, assign it a unique
4 exhibit number, and confirm that all other lead counsel are able to view the exhibit.

5 ix. **Review of Exhibits:** During the course of questioning a witness
6 must have the ability to view the entire exhibit that is being displayed and be given the ability to
7 review the document electronically pursuant to Section h below.

8 h. **Remote Deposition Exhibits:**

9 i. **Generally.** Deposing counsel shall be responsible for ensuring that
10 any exhibits that they wish to mark and use at the deposition can be shown to the witness and
11 opposing counsel in a manner that enables the witness and opposing counsel to review the exhibits
12 during the course of the deposition. The Parties agree to use Veritext Exhibit Share for marking
13 and presenting deposition exhibits to the deponent, court, reporter, defending counsel, and
14 attending counsel. In the event that Veritext Exhibit Share is not available to be used at a
15 deposition, the Parties shall meet and confer regarding alternative acceptable means of marking
16 and using exhibits for deposition, which shall include, by way of example: (a) emailing pre-
17 marked exhibits to the deponent, defending counsel, attending counsel, and the court reporter 24
18 hours in advance of the deposition; or (b) any other means that the deposing counsel, defending
19 counsel, and attending counsel agree to. If the remote means utilized does not permit marking of
20 exhibits remotely, deposing counsel shall be responsible for pre-marking exhibits.

21 ii. **Electronic Exhibits:** Counsel defending the deposition shall
22 instruct the witness not to download or otherwise save any documents marked as
23 CONFIDENTIAL, HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY, or HIGHLY
24 CONFIDENTIAL – SOURCE CODE under the Protective Order from the Veritext Exhibit Share
25 software onto their personal computers or devices.

1 i. **Reservation of Rights:** The parties may modify these procedures by
2 mutual agreement and reserve their rights to seek reasonable modifications of these procedures as
3 appropriate in individual circumstances.

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5 Dated: May 21, 2021

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1 Dated: May 21, 2021

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21 **ATTESTATION:** Pursuant to Local Civil Rule 5-1(i)(3), the Filer attests that concurrence in
22 the filing of this document has been obtained from all signatories.

* * *

ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: _____

THE HONORABLE JON S. TIGAR
UNITED STATES DISTRICT JUDGE